

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Nick Kuczek	Team: Squad #08	CCRB Case #: 202303075	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Tuesday, 04/11/2023 6:55 PM	Location of Incident: § 87(2)(b)	18 Mo. SOL 10/11/2024	Precinct: 40		
Date/Time CV Reported Wed, 04/12/2023 1:07 AM	CV Reported At: CCRB	How CV Reported: On-line website	Date/Time Received at CCRB Wed, 04/12/2023 10:33 AM		

Complainant/Victim	Type	Home Address

Witness(es)	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. PO Damion Cunningham	03411	969034	040 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. PO Victor Cunha	22862	971029	040 PCT
2. PO Bilal Malik	05735	972763	040 PCT
3. PO Kayfia Robinson	17458	968097	040 PCT
4. LT Julian Harris	00000	932775	040 PCT

Officer(s)	Allegation	Investigator Recommendation
A . PO Damion Cunningham	Abuse: Police Officer Damion Cunningham improperly used his body-worn camera.	
B . PO Damion Cunningham	Abuse: Police Officer Damion Cunningham entered § 87(2)(b) in the Bronx.	
C . PO Damion Cunningham	Abuse: Police Officer Damion Cunningham threatened to arrest § 87(2)(b)	
D . PO Damion Cunningham	Abuse: Police Officer Damion Cunningham threatened to arrest § 87(2)(b)	
E . PO Damion Cunningham	Abuse: Police Officer Damion Cunningham threatened to arrest § 87(2)(b)	
F . PO Damion Cunningham	Abuse: Police Officer Damion Cunningham threatened to arrest § 87(2)(b)	
G . PO Damion Cunningham	Abuse: Police Officer Damion Cunningham threatened to arrest § 87(2)(b)	
H . PO Damion Cunningham	Abuse: Police Officer Damion Cunningham threatened to arrest individuals.	

Case Summary

§ 87(2)(b) filed this complaint with the CCRB via on-line website on April 12, 2023.

On April 11, 2023, at approximately 6:55 PM, PO Damion Cunningham, PO Victor Cunha, PO Kayfia Robinson, and PO Bilal Malik of the 40th Precinct responded to a 911 call for police assistance by § 87(2)(b) who stated that her husband, § 87(2)(b) whom she had an active order of protection against, was trying to enter her home at § 87(2)(b) in the Bronx. Upon arrival on scene, § 87(2)(b) informed PO Cunningham that § 87(2)(b) had moved out of the home, that she had changed the lock on the door to prevent his return, and that she and her mother, § 87(2)(b) moved § 87(2)(b) remaining property out of the home and into a storage unit. PO Cunningham did not have his BWC activated for the first 52 minutes on scene during this incident (**Allegation A – Abuse of Authority:** § 87(2)(g)). While PO Cunningham discussed the eviction of § 87(2)(b) by § 87(2)(b) with PO Robinson and PO Malik outside of the home, and while PO Cunha spoke to NYPD Legal on the phone to determine whether § 87(2)(b) actions warranted a summons or an arrest, § 87(2)(b) closed the door to the home. PO Cunningham opened the door and placed his foot against the door to hold it open, beyond the threshold of the entrance of the home (**Allegation B – Abuse of Authority:** § 87(2)(g)). PO Cunha concluded his phone call with NYPD Legal and it was determined that § 87(2)(b) actions warranted a summons to be issued, which he began writing, and PO Cunningham told § 87(2)(b) and § 87(2)(b) that if they denied § 87(2)(b) re-entry into the home after the expiration of § 87(2)(b) order of protection at 12:00 AM on April 12, 2023, they would be arrested for unlawful eviction (**Allegations C and D – Abuse of Authority:** § 87(2)(g)). PO Cunningham remained standing with his foot beyond the threshold of the home entrance and threatened to arrest § 87(2)(b) for OGA after she told him to remove his foot from the doorway (**Allegation E – Abuse of Authority:** § 87(2)(g)). PO Cunningham threatened to arrest § 87(2)(b) (**Allegations F and G – Abuse of Authority:** § 87(2)(g)). § 87(2)(b) complained about the length of time PO Cunha was taking to issue § 87(2)(b) the summons, and PO Cunningham stated that if one more person interrupted, they would be arrested for OGA (**Allegation H – Abuse of Authority:** § 87(2)(g)). PO Cunha issued § 87(2)(b) the summons for unlawful eviction, gave it to § 87(2)(b) and the officer left the scene.

§ 87(2)(b) was issued a summons for Administrative Code Section 26-521(a)3: Unlawful Eviction as a result of the lock change and moving of § 87(2)(b) property out of § 87(2)(b) (Board Review 01).

The investigation obtained Body-worn camera footage (BWC) from PO Cunningham, PO Cunha, PO Robinson, and PO Malik (Board Review 02).

Findings and Recommendations

Allegation (A) Abuse of Authority: Police Officer Damion Cunningham improperly used his body-worn camera.

PO Cunningham activated his BWC at 7:46 PM, while he and PO Cunha arrived on scene at § 87(2)(b) at 6:54 PM (Board Review 02).

PO Cunningham stated that he activated his BWC after one of his fellow officers told him that his BWC was not on, and he did not know if he forgot to activate it, or if he pressed the button of his BWC and it did not activate due to malfunction. PO Cunningham stated that this job was a call for service that required BWC activation upon arrival on scene (Board Review 06).

According to NYPD Patrol Guide Procedure 212-123, BWC is required to be activated during any police action, including responding to calls for service (Board Review 15).

The incident at § 87(2)(b) was in response to a call for service that required BWC to be activated upon arrival. PO Cunningham acknowledged that his BWC was not activated upon arrival on scene and remained off for the first 52 minutes on scene. § 87(2)(g)

Allegation (B) Abuse of Authority: Police Officer Damion Cunningham entered § 87(2)(b) in the Bronx.

Allegation (C) Abuse of Authority: Police Officer Damion Cunningham threatened to arrest § 87(2)(b)

Allegation (D) Abuse of Authority: Police Officer Damion Cunningham threatened to arrest § 87(2)(b)

Allegation (E) Abuse of Authority: Police Officer Damion Cunningham threatened to arrest § 87(2)(b)

Allegation (F) Abuse of Authority: Police Officer Damion Cunningham threatened to arrest § 87(2)(b)

Allegation (G) Abuse of Authority: Police Officer Damion Cunningham threatened to arrest § 87(2)(b)

Allegation (H) Abuse of Authority: Police Officer Damion Cunningham threatened to arrest individuals.

§ 87(2)(b) provided a statement to the CCRB via telephone on April 18, 2023. He stated that on April 11, 2023, at approximately 8:00 PM, he arrived at the home of his sister, § 87(2)(b) located at § 87(2)(b) in the Bronx, after § 87(2)(b) called § 87(2)(b) and informed him that her husband, from whom she was seeking a divorce, § 87(2)(b) was on scene and violating an active order of protection. The temporary order of protection prevented § 87(2)(b) from having any contact with § 87(2)(b) § 87(2)(b) mother, § 87(2)(b) was present inside the home during this incident, and was the sole owner of the property. § 87(2)(b) stated that § 87(2)(b) had previously lived at § 87(2)(b) with § 87(2)(b) for several years but had moved out approximately two months before this incident, and he believed that § 87(2)(b) was attempting to move back in during this incident.

Upon arrival, § 87(2)(b) stood on the sidewalk outside of the § 87(2)(b) parking lot gate, and § 87(2)(b) walked through the parking lot and into § 87(2)(b) home where PO Cunningham, PO Cunha, PO Robinson, and PO Malik stood outside.

§ 87(2)(b) and § 87(2)(b) stood inside the living room, and PO Cunningham opened the front door of the home entirely and extended his right foot approximately two feet beyond the threshold of the doorframe and stood with his foot against the door. PO Cunningham did not ask anyone for consent to enter the home and did not obtain consent from anyone to enter the home during this incident. § 87(2)(b) and § 87(2)(b) all told PO Cunningham that he did not have consent to be inside the home, and PO Cunningham stated that he could be inside and needed the door to remain open because he was conducting an investigation. § 87(2)(b) walked to the door and stood next to PO Cunningham and held the door with her hand but did not attempt to close it. PO Cunningham told § 87(2)(b) that if she touched him or tried to close the door, he would arrest her.

PO Cunha stood outside the home and began issuing § 87(2)(b) a summons for the unlawful eviction of § 87(2)(b). § 87(2)(b) asked PO Cunningham why § 87(2)(b) was being summonsed, and PO Cunningham told him and § 87(2)(b) that if either of them interrupted his investigation again, they would be arrested for OGA. § 87(2)(b) then stated that PO Cunha was taking too long to issue the summons to § 87(2)(b) and PO Cunningham told § 87(2)(b) that if she continued to interrupt his investigation, she would be arrested for OGA. PO Cunha finished issuing the summons, handed it to § 87(2)(b) and the officers left the scene (Board Review 03).

§ 87(2)(b) provided a statement to the CCRB via telephone on June 13, 2023. Her statement was consistent with § 87(2)(b). § 87(2)(b) stated that at some point after § 87(2)(b) moved out of the home, she changed the lock on the door of the home and moved § 87(2)(b) remaining possessions into a storage unit. § 87(2)(b) stated that prior to PO Cunha issuing her a summons for the unlawful eviction of § 87(2)(b), PO Cunningham told her that if she did not grant § 87(2)(b) re-entry into the home following the expiration of her order of protection against him, she would be arrested (Board Review 04).

§ 87(2)(b) provided a statement to the CCRB via telephone on June 13, 2023. Her statement was also consistent with § 87(2)(b). § 87(2)(b) stated that her and § 87(2)(b) moved § 87(2)(b) property into a storage unit after he moved out. § 87(2)(b) stated that PO Cunningham told § 87(2)(b) that if she did not grant § 87(2)(b) re-entry into the home following the expiration of her order of protection against him, she would be arrested, but § 87(2)(b) did not recall any other threats of arrest made by PO Cunningham or any officer during this incident (Board Review 05).

PO Cunningham testified at the CCRB on August 14, 2023. He stated that on April 11, 2023, at approximately 6:55 PM, he, PO Cunha, PO Robinson, and PO Malik, responded to § 87(2)(b) 911 call where she stated that § 87(2)(b) was outside her home located at § 87(2)(b) in the Bronx and in violation of an order of protection she had in place against him. Upon arrival, § 87(2)(b) stood on the sidewalk in front of the § 87(2)(b) parking lot, and PO Cunningham walked through the parking lot and knocked on § 87(2)(b) door.

§ 87(2)(b) and § 87(2)(b) opened the door and § 87(2)(b) told PO Cunningham that § 87(2)(b) had arrived at the home and knocked on the door, and she presented PO Cunningham with an active order of protection against § 87(2)(b) that expired § 87(2)(b). § 87(2)(b) told PO Cunningham that § 87(2)(b) moved out of the home approximately two months ago, and both § 87(2)(b) and § 87(2)(b) stated that they had since changed the lock on the door and moved § 87(2)(b) remaining property into a storage unit.

PO Cunningham walked back to the sidewalk where § 87(2)(b) stood and informed him that § 87(2)(b) had an active order of protection against him. § 87(2)(b) told PO Cunningham that he had not been served the order of protection and that he was on scene to retrieve property from the home, and PO Cunningham told § 87(2)(b) that § 87(2)(b) had since moved his property into a storage unit.

PO Cunningham walked back to and stood at the front door of the home, and § 87(2)(b) arrived on scene. PO Cunningham used his discretion and allowed him inside the home. PO Cunningham stated that he did not have to allow § 87(2)(b) to enter the home because he was currently investigating a wrongful eviction, as both § 87(2)(b) and § 87(2)(b) acknowledged taking part in the changing of the lock and removal of § 87(2)(b) possessions from the home.

PO Cunningham walked away from the door of the home to discuss the wrongful eviction with PO

Robinson and PO Malik while PO Cunha spoke to NYPD Legal on his department cellphone to obtain confirmation on whether § 87(2)(b) could be summonsed or arrested for the wrongful eviction of § 87(2)(b) from the home, and § 87(2)(b) partially closed the door of the home. PO Cunningham walked back to and opened the door of the home, and stepped in and placed his foot against the door to hold it open. PO Cunningham stated that his foot was inside the home and beyond the threshold of the doorjamb because he needed to have a visual on § 87(2)(b) and § 87(2)(b) at all times during his investigation, as they were suspected of wrongfully evicting § 87(2)(b) and may need to be summonsed or arrested. PO Cunningham stated that he had no reason to believe that there was an emergency in the home that required his immediate presence, and that he did not ever request or obtain consent to enter the home. § 87(2)(b) told PO Cunningham that she did not want him inside the home and stated that PO Cunningham was trespassing inside the home.

Upon ending his phone call with NYPD Legal, PO Cunha told PO Cunningham that the unlawful eviction of § 87(2)(b) warranted a summons to be issued, and PO Cunha wrote and issued § 87(2)(b) a summons for wrongful eviction and the officers left the scene.

PO Cunningham was presented with his own BWC. The footage was played from 52:31 to 53:05, capturing PO Cunningham tell § 87(2)(b) and § 87(2)(b) that if they refuse to allow § 87(2)(b) re-entry into the home after the expiration of § 87(2)(b) order of protection § 87(2)(b) they would both be arrested. PO Cunningham stated that if they had done this, they could have been arrested for the unlawful eviction of § 87(2)(b). The footage was played from 53:35 to 53:55, capturing PO Cunningham tell § 87(2)(b) that if she moved his foot, that would constitute OGA, and that she would be arrested. PO Cunningham stated that he did not recall if § 87(2)(b) ever made physical contact with him but stated that he was informing her that if she did physically move his foot, she would be arrested for OGA. PO Cunningham stated that he did not think § 87(2)(b) could have been arrested for OGA based on the actions that she did take during this time and that he was only warning her not to obstruct him physically. The footage was played from 54:24 to 54:46, capturing § 87(2)(b) tell PO Cunningham, "It's cops like you why cops get hurt," with PO Cunningham stating, "Is that is a threat? If you're threatening me, you will be arrested," in response. PO Cunningham said this was to inform § 87(2)(b) that if he did threaten him, he could be arrested. PO Cunningham did not interpret § 87(2)(b) statement as a threat and that was why he asked § 87(2)(b) if he was threatening him. § 87(2)(b) could not have been arrested in this situation because PO Cunningham did not believe that § 87(2)(b) was threatening him. The footage was played from 54:46 to 54:55, capturing PO Cunningham state, "I'm about to OGA." PO Cunningham stated that this was directed at § 87(2)(b) because § 87(2)(b) was not supposed to be in the home due to an active investigation and was continually interrupting PO Cunningham by asking for updates on the situation. The footage was played from 1:03:01 to 1:03:33, capturing § 87(2)(b) complain about the length of time the officers were taking to write a summons to § 87(2)(b) and PO Cunningham state that if one more person interrupted, they would be arrested for OGA. PO Cunningham stated that PO Cunha was being verbally interrupted while writing a summons, constituting OGA, and that this was not directed at anyone of the individuals in particular (Board Review 06).

PO Cunningham's BWC captured his entry into § 87(2)(b) and the threats of arrest that followed. At 19:35, PO Cunningham opens the door to § 87(2)(b) apartment and steps inside, and § 87(2)(b) informs PO Cunningham that they are having a private conversation with their attorney, and PO Cunningham states that § 87(2)(b) needs to be visible. At 20:35, PO Cunningham tells § 87(2)(b) that they cannot close the door on him, and § 87(2)(b) tells PO Cunningham that that is not true and states, "This is called breaking and entering." At 22:15, § 87(2)(b) asks PO Cunningham if § 87(2)(b) can continue her conversation privately with her attorney, and

PO Cunningham tells § 87(2)(b) that he does not understand the severity of the situation. At 48:10, PO Cunningham tells § 87(2)(b) that § 87(2)(b) is going to receive a summons for the removal of § 87(2)(b) property from the home, and that if § 87(2)(b) is denied entry from the home after the expiration of the order of protection, § 87(2)(b) will be arrested. At 53:00, § 87(2)(b) tells PO Cunningham to arrest her, because it is her house, and PO Cunningham states that § 87(2)(b) will be arrested if she denies § 87(2)(b) access to the home following the expiration of the order of protection. At 53:12, § 87(2)(b) tells PO Cunningham that he is not the officer issuing the summons, so he can remove his foot from her door and leave her property. At 53:50, PO Cunningham states, “If you move my foot, that’s OGA, and you will be arrested.” At 54:25, § 87(2)(b) tells PO Cunningham, “It’s cops like you why cops get hurt,” and PO Cunningham states, “Is that is a threat? If you’re threatening me, you will be arrested,” and then states that he is about to “OGA.” At 1:03:10, § 87(2)(b) complains about the length of time the officers are taking to write the summons, and PO Cunningham states that if one more person interrupts, they will be arrested for OGA (Board Review 02).

PO Cunha, PO Robinson, and PO Malik’s BWC was consistent with that of PO Cunningham’s, and at 23:26 of PO Robinson’s second BWC, the right half of PO Cunningham’s body can be seen breaking the threshold of the door jambs of the entrance of § 87(2)(b) (Board Review 02).

According to NYC Administrative Code 26-521, it shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer, by engaging in conduct which prevents or is intended to prevent such occupant from the lawful occupancy of such dwelling, including, but not limited to, removing the occupant’s possessions from the dwelling unit and changing the lock on such dwelling occupant door (Board Review 07).

According to NYPD Patrol Guide Procedure 214-12, police officers may effect an arrest of a dwelling owner, defined as any person directly or indirectly in control of a dwelling such as the dwelling owner or tenant, who refuses to permit an occupant to re-enter a dwelling which they lawfully reside or through physical obstruction prevents an occupant from re-entering the dwelling (Board Review 08).

According to NY CLS Penal § 195.05, a person is guilty of obstructing governmental administration when they intentionally obstruct, impair, or prevent the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act (Board Review 09).

According to *People v. Sherman*, 116 Misc. 2d 109 (1982), verbally transmitting information to a police officer does not constitute intimidation, physical force, or interference, and therefore does not obstruct governmental administration (Board Review 10).

According to *People v. Joseph*, 156 Misc. 2d 192 (1992), to be guilty of obstruction of governmental administration, a person must take a physical act with intent to prevent an articulable and specific official function which is both authorized and lawful (Board Review 11).

According to *People v. Reese*, 5 Misc. 3d 1030 (2004), absent consent or exigent circumstances, the threshold at the entrance of a home may not reasonably be crossed without a warrant (Board Review 12). *People v. Mendoza*, 49 Misc. 3d 1007 (2015) defines such threshold of a home as the area directly between the doorjamb (Board Review 24).

According to *People v. Ormanian*, 55 Misc. 3d 566 (2016), the emergency exception permits officers to enter a protected space when they have reasonable grounds to believe an emergency is at hand and there is an immediate need for their assistance to protect life or property (Board Review 13).

In *People v. Mitchell*, 39 N.Y.2d 173 [1976], the Court of Appeals of New York stated that while warrantless entries and searches are presumptively unreasonable, an exception applies if officers “have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property,” have some “reasonable basis... to associate the emergency with the area or place to be searched,” and are not “primarily motivated by intent to arrest and seize evidence” (Board Review 25).

PO Cunningham acknowledged that he crossed the threshold of the entrance of § 87(2)(b) despite contest from § 87(2)(b) and a lack of consent to enter. He did so solely for the purpose of maintaining a visual on § 87(2)(b) and § 87(2)(b) because of the possibility that they would either be summonsed or arrested for the wrongful eviction of § 87(2)(b) § 87(2)(g)

§ 87(2)(b) § 87(2)(b)

§ 87(2)(b) § 87(2)(b)

It is undisputed that § 87(2)(b) had an active order of protection against § 87(2)(b) expiring on § 87(2)(b) that § 87(2)(b) resided at § 87(2)(b) for several years prior to moving out in March of 2023, that neither § 87(2)(b) nor § 87(2)(b) had taken any steps to legally evict § 87(2)(b) from the home, and that § 87(2)(b) and § 87(2)(b) both partook in the changing of lock and the removal of § 87(2)(b) property from the home. The investigation found that as per NYPD Patrol Guide Procedure 214-12 and NYC Administrative Code 26-521, had § 87(2)(b) or § 87(2)(b) prevented the re-entry of § 87(2)(b) into § 87(2)(b) after the expiration of § 87(2)(b) order of protection, they would have been subject to arrest for Wrongful Eviction, § 87(2)(g)

§ 87(2)(b) § 87(2)(b)

§ 87(2)(b) § 87(2)(b)

PO Cunningham acknowledged that when he stated, “If you move my foot, you will be arrested,” he did not believe that § 87(2)(b) could have been arrested and was only warning her that if she did physically move his foot, she would be arrested for OGA. § 87(2)(g)

§ 87(2)(b) § 87(2)(b)

§ 87(2)(b) § 87(2)(b)

§ 87(2)(b) § 87(2)(b)

§ 87(2)(b) § 87(2)(b)

While PO Cunningham stated that he was not threatening § 87(2)(b) with arrest for his statement of, “It’s cops like you why cops get hurt,” PO Cunningham’s statement of, “Is that a threat? If you’re threatening me, you will be arrested,” was made directly after § 87(2)(b) statement. § 87(2)(g)

§ 87(2)(b) § 87(2)(b)

§ 87(2)(b) § 87(2)(b)

§ 87(2)(b) § 87(2)(b)

PO Cunningham acknowledged that his statement of, “I’m about to OGA,” was directed at § 87(2)(b) and that he stated this because § 87(2)(b) was inside § 87(2)(b) where he was not supposed to be, and because § 87(2)(b) was repeatedly asking for updates on the situation. PO Cunningham stated that he allowed § 87(2)(b) to be present inside the home during his investigation. BWC revealed that § 87(2)(b) did not repeatedly ask PO

Cunningham or any police officer for updates on the situation during this incident and his verbal interactions with officers were minimal. § 87(2)(g)

PO Cunningham stated that his statement of, “One more person interrupts, it’s going to be OGA,” was not directed at anyone in particular, and he stated that he said this because § 87(2)(b) and § 87(2)(b) were verbally interrupting PO Cunha while he was writing § 87(2)(b) a summons. PO Cunningham made this statement directly after § 87(2)(b) made several comments regarding the length of time it was taking PO Cunha to finish writing the summons. Neither § 87(2)(b) nor § 87(2)(b) were saying anything when PO Cunningham makes this threat § 87(2)(g)

Civilian and Officer CCRB Histories

- This is the first CCRB complaint to which § 87(2)(b) has been a party (Board Review 16).
- This is the first CCRB complaint to which § 87(2)(b) has been a party (Board Review 17).
- This is the first CCRB complaint to which § 87(2)(b) has been a party (Board Review 18).
- PO Cunningham has been a member of service since January 06, 2020, and has been a subject in one CCRB complaint and three allegations. To date, this investigation is still open. § 87(2)(g)

Mediation, Civil, and Criminal Histories

- § 87(2)(b) declined to mediate this complaint.
- As of August 14, 2023, the New York City Office of the Comptroller has no record of a Notice of Claim being filed in regard to this incident (Board Review 20).

• [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

RPBP History

- This complaint did not contain any allegations of Racial Profiling/Bias-Based Policing.
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Squad: 8

Investigator:	<u>Nicholas Kuczek</u>	<u>Investigator Nicholas Kuczek</u>	<u>09/05/2023</u>
	Signature	Print Title & Name	Date

Squad Leader:	<u>Ethan De Angelo</u>	<u>IM Ethan De Angelo</u>	<u>09/06/2023</u>
	Signature	Print Title & Name	Date

Reviewer:	<u></u>	<u></u>	<u></u>
	Signature	Print Title & Name	Date